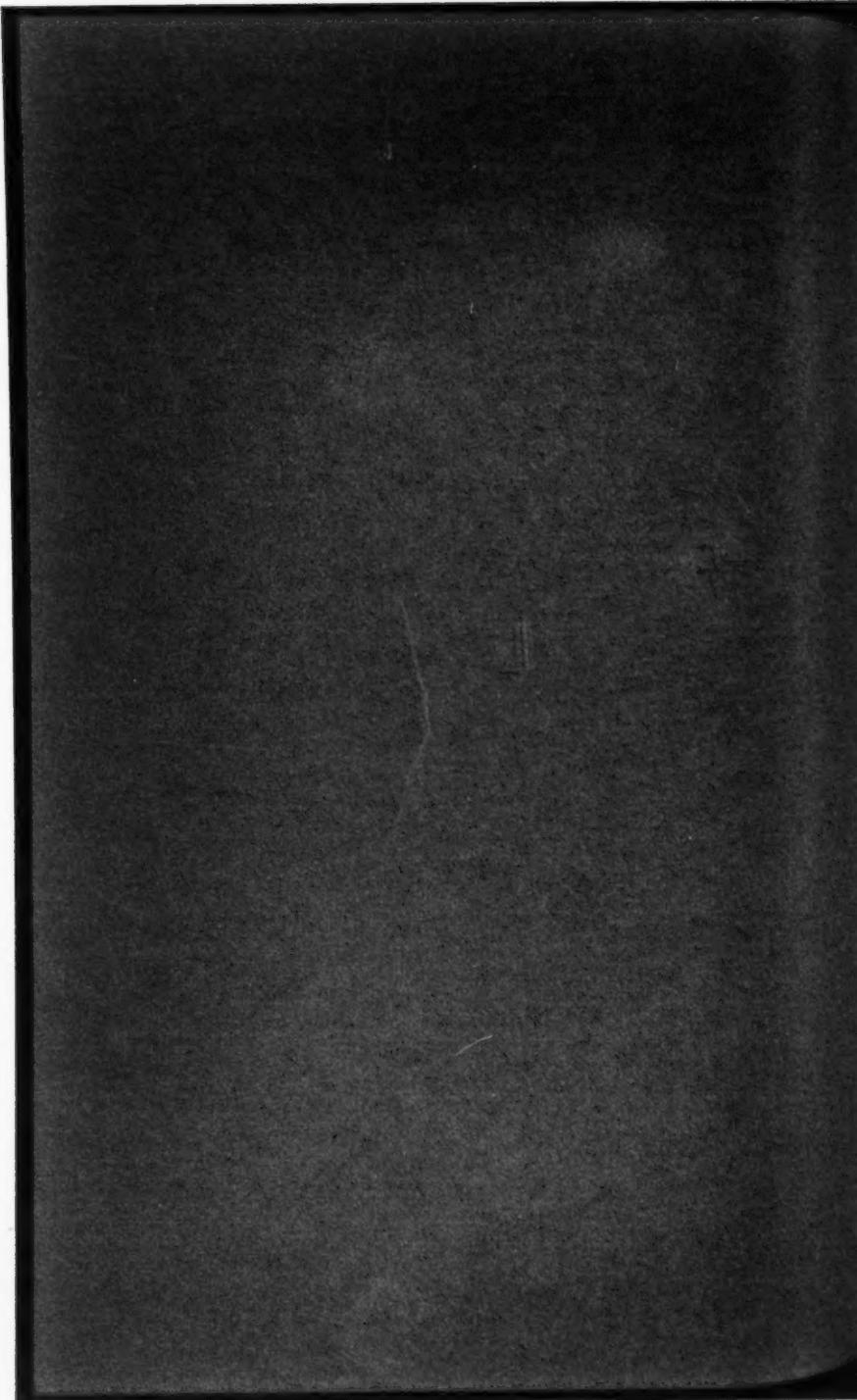




Nuance Q

BALDWIN

**BRISTOL
CLOTH**



INDEX

	Page
REASONS WHY WRIT OF CERTIORARI SHOULD NOT ISSUE.....	5
1. Inconsistent position of Petitioners	
in their pleadings.....	5
2. Acquiescence and laches is a question of State law and does not involve a Federal question	7
3. The validity of the lien of the District for taxes levied by it is a question of State law.....	9
CONCLUSION.....	12

TABLE OF CASES

	Page
Citizens National Bank vs. Durr, 257 U. S. 99.....	3
Enterprise Irr. Dist. vs. Farmers Mutual Canal Co., 243 U. S. 157.....	9
Eustis vs. Bowles, 150 U. S. 361.....	9
Hobo vs. U. S., 94 Fed. (2d) 351.....	10
Johnson vs. New York Life, 187 U. S. 491.....	3
Loeber vs. Shroder, 149 U. S. 580.....	3
Macclenny Turpentine Co. vs. Baldwin Drainage District, 18 So. (2d) 792.....	2
McCorquodale vs. Texas, 211 U. S. 432.....	3
Pierce vs. Somerset Ry. Co., 171 U. S. 641.....	9
Rutland Ry. Co. vs. Central Vermont Ry. Co., 159 U. S. 630.....	9
Seneca Nation vs. Christie, 162 U. S. 283.....	9
Shepard vs. Barron, 194 U. S. 553.....	9
State vs. Covington, 148 Fla. 42, 3 So. (2d) 521.....	4, 9
Tulare Irr. Dist. vs. Shepard, 195 U. S. 1.....	9

	Page
U. S. vs. 5 Acres of Land, 51 Fed. Sup. 117.....	10
U. S. vs. Certain Lands, 129 Fed. (2d) 577.....	11
U. S. vs. Certain Parcels of Land, 130 Fed. (2d) 782.....	10
U. S. vs. Certain Parcels of Land in Princee Georges County, 40 Fed. Sup. 436.....	10
U. S. vs. Certain Parcels of Land in San Diego, 44 Fed. Sup. 936.....	10
U. S. vs. Hotel Buckminster, 59 Fed. Sup. 65.....	10
Utleys vs. St. Petersburg, 292 U. S. 106.....	9



In the Supreme Court of the
United States

October Term 1945

NELLIE C. BOSTWICK, et al.,

Petitioners,

vs.

BALDWIN DRAINAGE DISTRICT, et al.

Respondents.

No. 838

**BRIEF OF RESPONDENTS IN OPPOSITION TO
GRANTING OF PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

This is the second time Petitioners have applied for a writ of certiorari in this case. Their former petition was denied, 319 U. S. 742.

A petition was filed by *Macclenny Turpentine Company*, et al. for certiorari to review a decision of the Supreme Court of Florida, to which two Petitioners were parties. That petition was also denied, January 15, 1945. Petitioners now seek review of a decision of the Circuit Court of Ap-

peals, 152 Fed. (2d). 1, which rests upon the decision of the Florida Supreme Court in the *Macclelenny Turpentine* case.

This case was instituted by the United States in 1941, to condemn lands lying within the Baldwin Drainage District in Duval County, Florida. No one opposed the right of the Government to take the property, or questioned the sufficiency of the amounts offered. Judgment of Taking was entered June 1, 1942, following verdict of a jury (p. 272 Tr.). All Defendants stipulated that

"the determination of adverse claims among them might be deferred until after the jury had made its awards of values."

Petitioners and Respondents filed answers to the Declaration of Taking. (Petitioners' answer, p. 81, Vol. I; Respondents' answer, p. 61, Vol. I.). The District asserted liens on Petitioners' lands for taxes levied to pay its debts, and for maintenance. Petitioners attacked the validity of the District, its assessment of benefits, the bonds issued by the District, the taxes levied by the District, etc. They also attacked two decrees of the Federal Court entered in 1931, of foreclosure of delinquent taxes. Respondents moved to strike that answer, and Petitioners countered with a motion to defer action until the case of *Macclelenny Turpentine Company vs. Baldwin Drainage District*, 18 So. (2d) 792, then pending in the State Court, which involved the same questions of law, should be determined (p. 265, Vol. I). The District Court deferred decision upon the validity of taxes that had not been foreclosed (pp. 274-5), and (p. 276) refused to vacate the foreclosure decrees. Petitioners appealed from that order. The Court of Appeals, (133 Fed. (2d) 1,) affirmed. Application to this Court for certiorari was denied, 319 U. S. 742.

Meantime, the *Macclelenny* case reached the Florida Su-

preme Court, which, April 4, 1944, rendered an opinion, 18 So. (2d) 792, and ordered the bill of complaint dismissed. Application to this Court for certiorari was denied January 15, 1945.

Four days after this Court denied certiorari, Petitioners (without leave of court) filed an amended answer (pp. 33-45, Vol. II, Tr.) which (pp. 3-4 Petition) they say was for

"the specific purpose of meeting the federal question deficiencies claimed to have existed in the state court record".

The District Court (p. 45, Vol. II) held that the answer and amendment were insufficient in law, and (p. 47, Vol. II, Tr.) ordered distribution.

Seven of the grounds for the writ (pp. 6-18 of the Petition) were not raised in the District Court or argued in the Court of Appeals. (See Petitioners' "Statement of Points", p. 53, and "Additional Point", p. 57). They were first raised in a petition for rehearing (p. 71 Tr.).

This Court has repeatedly held that it will not, in an appeal from a State Supreme Court, consider a Federal question which is raised for the first time in a petition for rehearing; *Loeber vs. Schroder*, 149 U. S. 580; *Johnson vs. New York Life*, 187 U. S. 491; *McCorquodale vs. Texas*, 211 U. S. 432; *Citizens National Bank vs. Durr*, 257 U. S. 99; especially where, the petition was denied without opinion.

All of the reasons given for that rule apply with equal force here, though this petition seeks review of a decision of a Circuit Court of Appeals.

The opinion of the Court of Appeals rests largely upon the decision of the Florida Court in the *Macclenny* case,

supra, and upon *State vs. Covington*, 148 Fla. 42, 3 So. (2d) 521. As the Supreme Court of Florida said, the objections of Petitioners in the *Macclenny* case

"ran the full gamut of the District's existence from its very inception".

Its decision was that the bill of complaint should be dismissed because it failed to show that the former owners of the lands had objected to the acts challenged

"or that any of their successors protested until the filing of the present bill";
that Petitioners were estopped

"because of the extensive period of time which elapsed between the formation of the District and the filing of the bill" (a period of about 25 years).

The Court of Appeals in this case said that the Florida Court had

"adjudged that the property owners of the District were estopped to challenge the propriety of the formation or acts of the District by the acquiescence of themselves and their predecessors in title over a period of more than 27 years";

that Petitioners were in no better position than were Plaintiffs in the State Court case.

With reference to the claim of Petitioners that their rights under the Fourteenth Amendment had been violated, it said

"the acquiescence which estopped them to enforce their particular rights likewise operates as a waiver of the general right to enforce due process".

REASONS WHY WRIT OF CERTIORARI SHOULD NOT ISSUE

There are three reasons why this Court should not issue a writ of certiorari to the Fifth Circuit Court of Appeals:

1. In their pleading in the District Court, Petitioners alleged that the case of *Macclenny Turpentine Company vs. Baldwin Drainage District* in the State Court would determine

"the numerous state statutory questions presented in this case",

They should not now be allowed to say that those questions were not determined, since the Florida Supreme Court dismissed that complaint.

2. Whether Petitioners are, by acquiescence or estoppel, barred from attacking the validity of the lien of District taxes, is a question of State law, not a Federal question. The Supreme Court of Florida in the *Macclenny* case held that land owners had acquiesced, waived, or were estopped.

3. The validity of the liens of the District for taxes is a matter of State law that has been determined by the Supreme Court of Florida. Being prior liens, they are payable from the funds deposited by the Government, before distribution of any funds to landowners.

1. Inconsistent position of Petitioners in their pleadings.

After it appeared from the answers of Petitioners and Respondents (pp. 81 and 61, Vol. I) that they did not contest the right of the Government to take the lands, or the amounts offered therefor, Respondents moved to strike Petitioners' answer (p. 257, Vol. I). Petitioners countered with a motion (pp. 265-70, Vol. I) to defer and postpone a decision of the

"questions of conflicting title presented by the answer of petitioners"

until after the State Courts should decide *Macclenny Turpentine Company vs. Baldwin Drainage District*, et al. *supra*, because, as they said, the questions involved in this case were

"pending for decision in the State Courts"; that two of Petitioners were

"parties plaintiff to said suit of *Macclenny Turpentine Co.* et al vs. *Baldwin Drainage District*"

and expected to join with others in an appeal to the Supreme Court of Florida if the lower court should decide against them

"so as to have the numerous *state statutory questions* presented duly and promptly determined."

Their motion also sought to defer action upon the validity of the foreclosure decrees. The District Court's order (pp. 274-5) recited pendency of the suit in the State Court to enjoin the levy and collection of taxes by the District

"on the ground that the same are illegal and void, and that the legal questions raised in that suit are similar, and in many respects identical to the questions raised by the said answer, and that said questions involve a decision of the applicable Florida law which has not heretofore been settled by the Supreme Court of Florida",

and postponed a decision of those questions until further order of the Court (pp. 276-82).

It also overruled Petitioners' contention that the foreclosure decrees were void. From that order the previous appeal in this case was taken; judgment was affirmed and certiorari denied (*supra*).

On April 4, 1944, the Supreme Court of Florida decided the *Macclenny* case. This Court denied the petition for certiorari on January 15, 1945. Four days after certiorari was denied, Petitioners filed an amended answer in this case (p. 33, Vol. II), and began relitigation of these State statutory questions. Yet this Petition and supporting brief directly (p. 13) and indirectly say that the decision of the Florida Court did not settle or determine

"the state statutory questions"

which they previously said would be settled thereby. They assume that the Florida Court's decision is limited, and ignore the fact that the Court directed the lower court

"to enter an order dismissing the bill".

That bill has been dismissed. The bill was held to have *no equity*. Since two Petitioners were parties to the suit in the State Court, and all parties were represented by counsel for these Petitioners, it is apparent that the purpose of this proceeding is to relitigate here questions that were settled by the State Court's decision.

2. *Acquiescence and laches is a question of State law and does not involve a Federal question.*

The Circuit Court of Appeals so held in its opinion. That was the only point raised by Petitioners in their appeal, as the pleadings and the Specification of Points show. The Circuit Court of Appeals said the claim of Petitioners, that enforcement of the taxes would deprive them of property without due process of law, was involved in the *Macclenny* case, and

"was foreclosed against them by that decision".

The effort of Petitioners to show the contrary must fail because

(1) the opinion and order of the Florida Supreme Court was that the bill of complaint should be dismissed. This was a ruling on all matters presented by the bill;

(2) Petitioners in the District Court alleged that the case in the State Court was similar, and the order of the District Judge found it was

"in many respects identical";

(3) The bill of complaint in the *Macclenny* case (p. 1 of Case 714 of the October Term of 1944 of this Court) and the answers of Petitioners in this case (Vol. I, p. 81 et seq. and Vol. II, p. 33 et seq.) show that the cases are identical in the relief sought and the purposes to be accomplished, as well as in the allegations of substantial facts. Both cases were prosecuted by the same counsel, at the same time, and two of these Petitioners were parties to the *Macclenny* case.

Petitioners say that the District Court and the Circuit Court of Appeals in effect held, that under the *Erie* case they were bound by the decision of the Supreme Court of Florida in the *Macclenny* case, but no such statement appears in the order or opinion of those courts.

The *Erie* case does hold that Federal Courts must accept a decision of the Florida Supreme Court as controlling on questions of State law. But even prior to that decision, Federal Courts followed decisions of State Courts construing and applying State statutes, particularly where, as here, the decision of the State Court involved the same District, and the same substantial questions of fact and law.

This Court holds that

"a person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute,

and the question whether he has or has not lost such right by his failure to act, or by his action, is not a Federal one."

Eustis vs. Bowles, 150 U. S. 361; *Rutland Ry. Co. vs. Central Vermont Ry. Co.*, 159 U. S. 630; *Seneca Nation vs. Christie*, 162 U. S. 283, and *Pierce vs. Somerset Ry. Co.*, 171 U. S. 641. (The above quotation is from this case).

It applied this to a case involving the validity of Irrigation or Drainage District taxes, *Enterprise Irr. District vs. Farmers Mutual Canal Co.*, 243 U. S. 157, and to a case where the validity of a paving lien was attacked, *Utley vs. St. Petersburg*, 292 U. S. 106 (a Florida case).

In *Shepard vs. Barron*, 194 U. S. 553, and in *Tulare Irr. Dist. vs. Shepard*, 195 U. S. 1, taxpayers were held to have lost their rights by acquiescence or estoppel. The Florida Supreme Court cited the latter case as authority for its decision.

3. The validity of the lien of the District for taxes levied by it is a question of State law.

The validity of the statute of Florida under which the District was organized is not attacked in this proceeding. The attack is upon taxes levied for the payment of the District debts and for maintenance of the District, on facts *de hors* the record.

State vs. Covington, 3 So. (2d) 521, was a direct attack upon the validity of the organization of the District, and was dismissed by the Florida Court. That decision was reaffirmed in the *Macclenny* opinion. Relators in the *Covington* case included Petitioners. In that case, the Florida Court dismissed the proceeding because the District possessed

"jurisdiction and powers pursuant to which contractual and other rights have been acquired and not fully discharged",

that is, it had not paid its debts. The District was preserved to protect those contractual rights. Petitioners would ignore the rights of creditors, as their brief shows. As the Florida Court said, it is too late for Plaintiffs

"to repudiate the obligations of the District". Thus the Florida Supreme Court has held that the District had power to levy taxes to pay its debts; that taxes it has levied are not void for any of the reasons set forth in the Complaint in the *Macclenny* case. This Court refused to review that decision of the Florida Court. The Court of Appeals affirmed the decision of the District Court, holding that the answers of Petitioners are insufficient.

The validity of taxes levied by a State, or a subdivision of a State, upon property taken by the Federal Government in a condemnation proceeding, is a question of State law only. This has been repeatedly decided by Federal Courts. *U. S. vs. Certain Parcels of Land*, 130 Fed. (2d) 782; *Hobo vs. U. S.*, 94 Fed. (2d) 351; *U. S. vs. Certain Parcels of Land in San Diego*, 44 Fed Sup. 936; *U. S. vs. Certain Parcels of Land in Prince Georges County*, 40 Fed. Sup. 436; *U. S. vs. Hotel Buckminster*, 59 Fed. Sup. 65, and *U. S. vs. 5 Acres of Land*, 51 Fed. Sup. 117.

The reason is obvious. The amount the Government has to pay for the land is not affected by their existence or the amount of them. The verdict and Judgment of Taking finally disposed of the Government's interest in the suit, and to all practical intents and purposes, the United States was thereafter not a party. Litigation since then has involved merely a private controversy between Petitioners

and Respondents as to the validity of the liens for taxes that were levied before the lands were taken. Since the Florida Court has held those taxes valid, the lien is now against the funds deposited by the Government. That is not controlled by the Federal statute.

The provisions of Sec. 258(a) that

"The Court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, * * * if any, as shall be just and equitable"

did not, since it could not, authorize a Federal Court to refuse to pay valid tax liens, or to arbitrarily determine that a lesser amount be accepted by the lien holder in satisfaction of its liens. The tax had to be paid in full in order to clear the title. Besides, Petitioners in this case have not questioned the amount of taxes due. They have contended that the taxes *were wholly void*, and that contention has been decided against them by the State Court.

Validity of the State statute under which the District was organized is not questioned. Validity of the District under the statute has been determined by the State Court and is now admitted by Petitioners. Validity of taxes has also been determined by the Supreme Court of Florida. The liens of the District are, therefore, against the funds in the hands of the Court, and those liens must be paid before a distribution of them can be made to any other parties. Payment of the liens is "just and equitable", for equity follows the law. Unless the liens are paid, there will be neither justice nor equity.

U. S. vs. Certain Lands, 129 Fed. (2d) 577 is not to the contrary. Neither the validity of the mortgage lien in that case, nor the amount due thereon was questioned. The Court's reference to the statute was not necessary to de-

cision. The only question decided was the date to which interest on the mortgage should be paid. The New York statute applied to condemnation by the State only, and had no application. Petitioners here do not question either the amount of the lien or the amount of interest due the District.

CONCLUSION

We respectfully submit that the petition for writ of certiorari should be denied for the reasons given.

Respectfully submitted,

GILES J. PATTERSON,
Jacksonville, Florida;

JOHN W. HARRELL,
Jacksonville, Florida,
Attorneys for Respondents.

